No. 8[redacted]186

IN THE

Supreme Court of the United States

MARCH TERM, 1921.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART ET AL., PLAINTIFFS IN ERROR,

VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(27,342)

BRIEF FOR THE DEFENDANTS IN ERROR.

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ARGUMENT.

Two points are involved in this controversy:

(a) One of Fact.

(b) One of Law.

(a) Fact Question.

Many years prior to the institution of this suit in the State Court, the Board of Supervisors of Pocahontas County, Iowa, in strict compliance with the requirements of the Iowa Statute established and constructed a drainage ditch. After the lapse of years the ditch became inefficient and required repairs. It is the contention of the plaintiffs in error that the Board of supervisors constructed a new improvement rather than repair the old improvement. This question has twice been passed upon by the Iowa Courts, the District or Trial Court holding contrary to the contention of the plaintiffs in error. The Supreme Court of Iowa specifically held and determined this fact question contrary to the contention of the plaintiffs in error. This fact question is determinative of the rights of the plaintiffs in error at this time.

We set forth the material sections of the Iowa Statute bearing upon this controversy. They are as follows:

> Chapter 2-A.
>
> Of Levees, Ditches, Drains and Watercourses.
>
> Section 1989-a1. Board of supervisors to establish drainage district. The board of supervisors of any county shall have jurisdiction, power and authority at any regular special or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided, any levee, ditch, drain or watercourse, or to straighten, widen, deepen or change any natural watercourse, in such county, whenever the same will be of public utility

or conducive to the public health, convenience or welfare, and the drainage of surface waters from agricultural lands shall be considered a public benefit and conducive to the public health, convenience, utility and welfare.

Sec. 1989-a2. Proceedings—bond—survey. Whenever a petition signed by one or more of the landowners whose lands will be affected by, or assessed for the expenses of, the proposed improvement, shall be filed in the office of the county auditor setting forth that any body or district of land in the county, described by metes and bounds, or otherwise, so as to convey an intelligible description of such lands, is subject to overflow or too wet for cultivation, and that the public benefit or utility, or the public health, convenience or welfare will be promoted by draining, ditching, tiling or leveeing the same, or by changing a natural watercourse, and setting forth therein the starting point, route and terminus and lateral branches, if necessary, of the proposed improvement, and there is filed therewith a bond, in amount and with sureties to be approved by the county auditor and conditioned for the payment of all costs and expenses incurred in the proceedings in case the supervisors do not grant the prayer of said petition, the board shall at its first session thereafter, regular, special or adjourned, appoint a disinterested and competent engineer, who shall give bond to the country for the use and benefit of the proposed levee or drainage district, if it be established, in amount and with sureties to be approved by the county auditor and conditioned for the faithful and competent performance of his work; and place a copy of the petition and any other lands which would be benefited by said improvement or necessary in the carrying out of said improvement, and survey and locate such drains, ditch or ditches, improvement or improvements, as may be practicable and feasible to carry

out the purposes of the petition and which will be of public benefit or utility or conducive to public health, convenience or welfare. He shall made return of his proceedings to the county auditor, which returns shall set forth the starting point, the route, the terminus or termini of the said ditch or ditches, drain or drains, or other improvements, together with a plat and profile showing the ditches, drains or other improvements, and the course and length of the drain or drains through each tract of land, together with the number of acres appropriated from said tract for construction of said improvement, and the elevation of all lakes, ponds and deep depressions in said district, and the boundary of the proposed district, so as to include therein all lands that will be benefited by the proposed improvements, and the description of each tract of land therein and names of the owners thereof as shown by the transfer books in the auditor's office, together with the probable cost, and such other facts and recommendations as he may deem material. The board of supervisors may at any time recall the appointment of any engineer made under the provisions of this act, if deemed advisable to do so, and select another to act in his place. That the ditches or drains herein provided for shall so far as practicable be surveyed and located along the general course of the natural streams and watercourses or in the general course of natural drainage of the lands of said district, but where it will be more economical or practicable such ditch or drain need not follow the course of such natural streams, watercourses, or course of natural drainage, but may straighten, shorten or change the course of any natural stream, watercourse or general course of drainage. Whenever any ditch or drain crosses any railroad right of way it shall when practicable be located at the place of the natural waterway across such right of way unless said railroad com-

pany shall have provided another place in the construction of the roadbed for the flow of the water; and if located at the place provided by the railroad company, such company shall be estopped from afterwards objecting to such location on the ground that it is not at the place of the natural waterway.

Sec. 1989-a3. Notice of hearing—approval of plan— * * * fees and mileage for serving notice. That the law as it appears in section nineteen hundred eighty-nine a three of the supplement to the Code, 1907, be repealed and the following substituted in lieu therefor:

"Upon the filing of the return of the engineer, if the same recommends the establishment of the levee or drainage district, the board of supervisors shall then examine the return of the engineer, and if the plan seems to be expedient and meets with the approval of the board of supervisors, they shall direct the auditor to cause a notice to be given, as hereinafter provided; but if it does not appear to be expedient and is not approved, the board of supervisors are hereby authorized to direct said engineer, or another engineer selected by them, to report another plan. At any time prior to the establishment of the district, the plan may be amended, and as amended shall be conclusive, unless appealed from as provided in section nineteen hundred eighty-nine a six of this chapter. When the plan, if any, shall have been finally adopted by the board of supervisors, they shall order the auditor immediately thereafter to cause notice to be given to the owner of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office, including railway companies having right of way in the proposed district, and to each lien holder or incumbrancer of any land through which or abutting upon which the proposed improvement extends as shown by the county records, and also to all other persons whom it may

concern, including actual occupants of the land in the proposed district (without naming individuals), of the pendency and prayer of said petition, the favorable report thereon by the engineer and that such report may be amended before final action, the day set for hearing on said petition and report before the board of supervisors, and that all claims for damages must be filed in the auditor's office not less that five days before the day set for hearing upon the petition, which notice shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing upon the petition, proof of such service to be made by affidavit of the publisher and filed with the county auditor; provided further, however, that when any resident, non-resident, corporation, railroad company, or other persons owning or having an interest in any land or property affected by the proposed improvement shall have filed with the county auditor of the county wherein such improvement is proposed, an instrument in writing, duly signed, and designating the name and post office address of his or its agent upon whom service of notice in said matter shall be made, the county auditor shall, at least twenty days prior to the date set for hearing upon said petition, mail a true copy of said notice in a registered letter addressed to the person or agent so designated in said written instrument, as aforesaid. Proof of such service of said notice shall be made by affidavit of said county auditor and filed by him in said matter in his said office on or before the date of the hearing upon the petition, and such service shall be in lieu of all other service of notice to such residents, non-residents, corporations, railroad companies or other persons. No notice need be served

by the auditor upon any of the persons hereinbefore described who shall file with said auditor a statement in writing signed by him entering his appearance at said hearing and waiving any additional notice. If, at the date set for the hearing before the board of supervisors, it should appear that any person entitled to notice, as provided in this section, has not been served with notice for the time, or in the manner, as herein provided, the board may postpone said hearing and set another time for the same, and notice of such day of hearing may be served on such omitted parties in the manner and for the same length of time as provided for in this section; and by fixing such new day for hearing and by adjourning said proceedings to said time, the board of supervisors shall not be held to have lost jurisdiction of the subject matter of said proceeding, nor of any parties so previously served with notice. Personal service upon any of the parties above described in the manner and for the time required for service of original notices shall be sufficient and make publication of notice as to such persons unnecessary."

Sec. 1989-a4. *Claims for damages.* Any person claiming damages as compensation for or on account of the construction of such improvement shall file such claim in the office of the county auditor at least five days prior to the day on which the petition has been set for hearing, and on failure to file such claim at the time specified, shall be held to have waived his rights thereto; provided, however, that it shall not be necessary to file claims covering value of land appropriated for right of way for construction of proposed improvements.

Sec. 1989-a5. *Location—Appraisers.* The board of supervisors at the session set for the hearing on said petition, which session may be regular, special or adjourned, shall thereupon proceed to hear and determine the sufficiency of the petition in form and substance, which petition may be amend-

ed as to form and substance at any time before final action thereon, and, if deemed necessary, the board may view the premises and if they shall find that such levee or drainage districts would not be for the public benefit or utility, nor conducive to the public health, convenience or welfare, they shall dismiss the proceedings; but if they shall find such improvement conducive to the public health, convenience or welfare or to the public benefit or utility and no claim shall have been filed for damages as provided in section four hereof, they may, if deemed advisable, locate and establish the same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem best; and at said hearing, the board may order the said engineer or a new engineer appointed by them if deemed advisable to make further examination and report to said board as to said proposed improvement, and if they determine that further examination and report shall be made, or if any claims have been filed for damages, as provided in section four hereof, then the board of supervisors shall proceed no further than to determine the necessity of the levee or drainage districts and further proceedings shall be continued to an adjourned, regular or special session, the date of which shall be fixed at the time of the adjournment; and the county auditor shall appoint three appraisers to assess such damages, one of whom shall be the engineer theretofore appointed as above provided, or, in case of his absence or inability to act, some other engineer, and two freeholders of the county who shall not be interested in, nor related to any party interested in the proposed improvement.

Sec. 1989-a6. *Assessment of Damages—Appeal.* The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all

acreage taken for right of way as shown by plat of engineer and shall, at least five days before the date fixed by the board to hear and determine the same, file with the county auditor reports in writing showing the amount of damages sustained by each claimant. Should the report not be filed in time or should any good cause for delay exist the board may postpone the time of final action on the subject and, if necessary, the auditor may appoint other appraisers. When the time for final action shall have arrived, and after the filing of the report of the appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish the same, and they shall thereupon appoint said engineer, or if deemed advisable, may appoint a n engineer as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty-acre tract of land and shall file a report of the same with the county auditor together with a plat and profile thereof and shall thereupon proceed to determine the amount of damages sustained by each claimant, and may hear evidence in respect thereto, and may increase or diminish the amount awarded in respect thereto, and any party aggrieved may appeal from the finding of the board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district court by filing notice with the county auditor at any time within twenty days after such finding, at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal unless the finding of the district court shall be more favorable to the appel-

lant or appellants than the finding of the board, which appeal shall be tried in the district court as an ordinary proceeding, except that when the appeal is from the order of the board in establishing or refusing to establish the levee or drainage district, it shall be tried in equity and the appearance term shall be the trial term; the finding of the court in relation to the establishment of or refusal to establish the levee or drainage district shall be certified by the clerk of the board of supervisors, who shall enter an order in harmony therewith and proceed accordingly. If the appeal is from the amount of damages allowed, the amount ascertained in the district court shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. If the appeal is from the action of the board in establishing or refusing to establish said drainage district, the court shall enter such order as may be proper in the premises, and the clerk of said court shall certify the same to the board of supervisors, who shall proceed thereafter in said matter in accordance with the order of the court. How the costs shall be distributed among the litigants and against whom the same shall be taxed shall rest in the discretion of the trial court.

Sec. 1989-a7. *Damages—By Whom—Division into Districts—Engineer.* The amount of damages finally determined by the board in favor of any claimant or claimants shall be required to be paid in the first instance by the parties benefited by the said levee or drainage district, or secured to be paid by sufficient bond to be fixed and approved by the county auditor, and after such damages shall have been paid or secured as aforesaid, the board shall divide said improvement into suitable sections, numbering the same consecutively from the source or

beginning of the improvement downward towards its outlet and prescribe the time within which the improvement shall be completed and appoint a competent engineer to have charge of the work of construction thereof, who shall be required before entering upon the work to give a bond to the county for the use and benefit of the levee or drainage district to be approved by the auditor in such sum as the board may fix, conditioned for the faithful discharge of his duties.

Sec. 1989-a8. *Letting Work—Notice—Bids.* The board shall cause notice to be given by publication, once each week, for two consecutive weeks in some newspaper published in the county wherein such improvement is located and such additional publication elsewhere as they may direct, of the time and place of letting the work of construction of said improvement, and in such notice they shall specify the approximate amount of work to be done in each section and the time fixed for the commencement and completion thereof; and when the estimated cost of said improvement exceeds fifteen thousand dollars the board shall make additional publication for two consecutive weeks in some contracting journal of general circulation, of such notice as they may prescribe, and they shall award contract or contracts for each section of the work to the lowest responsible bidder or bidders therefor, bids to be submitted, received and acted upon separately as to the main drain and each of the laterals, exercising their own discretion as to letting such work as to the main drain as a whole, or as to each lateral as a whole, or by sections as to both main drain and laterals, and reserving the right to reject any and all bids and readvertise the letting of the work. Each person bidding for such work shall deposit in cash or certified check a sum equal to ten per centum of the amount of the bid, not in any event, however, to exceed ten thousand dollars, said deposit to be re-

turned to him if his bid is not successful, and if successful to be retained as a guarantee only of his good faith in entering on said contract. The successful bidder shall be required to execute a bond with sufficient sureties in favor of the county for the use and benefit of the levee or drainage district in an amount equal to twenty-five per centum of the estimated cost of the work so let, or he may deposit such amount in cash with the auditor as security for the performance of his contract and upon the execution of such bond, or the making of such deposit, the deposit originally made with his bid shall be returned to him.

Sec. 1989—a-11. *Changes in Dimensions—Notice—Objections—Appeal.* That the law as it appears in section nineteen hundred eighty-nine-a eleven of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof.

If, after the establishment of said district, and before the completion of the drainage improvements therein, it shall become apparant that a levee or drain should be enlarged, deepened or otherwise changed or that a change or alteration in the location should be made for the better service thereof, said board may by resolution authorize such change or changes in the said improvement as the engineer shall recommend; provided that, whenever any change or changes are made either under this section or under any other section of this chapter, all persons whose land shall be taken or whose assessments shall be increased thereby shall first have been given like notices as provided in section nineteen hundred eighty-nine-a three of this chapter, and shall have like opportunity to file claims for damages, as provided for in section nineteen hundred eighty-nine-a four of this chapter, or file objection to such assessment as provided in section nineteen hundred eighty-nine-a

twelve of this chapter, as the case may be, and like opportunity to appeal from the action of the board as provided in section nineteen hundred eighty-nine-a of this chapter, as the case may be.

Sec. 1989-al2. *Assessment of Costs and Damages—Apportionment.* When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, re-opened or cleared from any obstruction therein, unless such repairs, reopening or clearing of obstruction can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or re-opening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement, or the repairing or re-opening of the same, and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classi-

fication when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed, they shall specify each tract of land by proper description and the ownership thereof as the same appears on the transfer books in the auditor's office, and the auditor shall cause notice to be served upon each person whose name appears as owner and also upon the person or persons in actual occupancy of any such land in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner, upon each tract or lot, the day set for hearing the same before the board of supervisors and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report and may increase, diminish, annul or affirm the apportionment made in said report or in any part thereof as may appear to the board to be just and equitable; but in no case shall it be competent to show that the lands assessed would not be benefited by the improvement, and when such hearing shall have been had the board shall levy such apportionment so fixed by it upon the lands within such levee or drainage district; and all installments of the tax shall be levied at that time, and shall bear interest at six per cent, per annum from that date; provided that if the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, shall, within twenty days from the date of such assessment, promise and agree in writing filed in the office of

the county auditor that in consideration of his having the right to pay his assessments in installments he will not make any objection of illegality or irregularity as to the assessment of benefits or levy of such taxes upon or against his property, but will pay said assessment, then said taxes levied against said land, lot or premises of such owner shall be payable as follows: one-third of the amount of said assessment at the time of filing the above agreement; one-third within ten days after the engineer in charge of said drainage improvement shall file a certificate in the office of the county auditor that said improvement is one-half completed, and the remaining one-third within ten days after the said improvement shall have been accepted by the board of supervisors, and if said installments are not paid as above provided, the failure to pay any installment shall cause the whole sum to become due and payable at once with interest at the rate of one per cent per month from the date of filing said agreement, and such assessments shall thereupon be collected as other taxes on real estate, which rate may be later reduced to correspond with the rate specified in the certificates or bonds, as the case may be. Provided, however, that no deferred installment of the amount assessed, as between vendor and vendee, mortgagor and mortgagee, shall become a lien upon the property against which it is assessed and levied, until the thirty-first day of December of the year next preceding that in which it is due and payable; and in case the board of supervisors shall increase said apportionment, service of notice thereof shall be made upon the owner of such tract or lot of land as shown by the transfer books in the auditor's office, in the same manner in which original notices are required to be served, where such owner is a resident of the county, and in case such owner is a non resident of the country such notice as to him shall be served on the actual occupant of

the tract or lot of land; provided that in case any railroad company shall be affected by such increased apportionment said notice shall be served upon the station agent of the said railroad company nearest the proposed improvement. If the first assessment made by the board of supervisors for the original cost or for repairs of any improvement as provided in this act is insufficient, the board may make an additional assessment and levy in the same ratio as the first for either purpose.

Sec. 1989-a14. *Appeal—Drainage Record—Counsel—Establishment Rescinded—New Hearing.* An appeal may be taken to the District Court from the order of the board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the board of supervisors increasing the apportionment within twenty days after the completed service of notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioner or not. The appeal herein provided for shall be tried in the District Court as an action in equity and the appearance term shall be the trial term; and when several appeals are taken and pending in the District Court by land owners of the same drainage district whose lands have been assessed by the board, the court may, in its discretion, order the consolidation of such cases, and try the same as one cause of action. When any appeal is taken from any order of the board made in any drainage proceeding coming before it for action, it shall be the duty of the board to employ counsel to represent the interests of the drainage district affected by said appeal on the trial thereof in the appellate courts and the expense thereof shall be paid out of the drainage fund of such district. In all actions

or appeals involving or affecting the drainage district, the board of supervisors shall be a proper party for the purpose of representing the drainage district, and all interested parties therein, other than the adversary parties thereto, and the employment of counsel by the board, as authorized by this chapter, shall be for the purpose of protecting all the rights of the drainage district and interested parties therein, other than the adversary parties thereto; in all appeals or actions adversary to the district, the appellant or complaining party shall be entitled the plaintiff, and the board of supervisors and drainage district it represents, the defendants, and in all appeals or actions for or in behalf of the district, the board of supervisors and the drainage district it represents may sue as and be entitled the plaintiffs. When an appeal authorized by this chapter is taken, the county auditor shall forthwith make a transcript of the notice of appeal and appeal bond and transmit the same to the clerk of the District Court, and the clerk shall docket the same upon payment by the appellant of the docket fee; and on or before the first day of the next succeeding term of the district court, the appellant shall file a petition setting forth the order of decision of the board appealed from and his claims and objections relating thereto; a failure to comply with these requirements shall be deemed a waiver of the appeal and in such case the court shall dismiss the same; it shall not be necessary for the appellee to file answer to the petition, unless some affirmative defense is made thereto, but he may do so. The board shall provide a book to be known as the drainage record and the county auditor shall keep a full and complete record therein of all proceedings of the board relating to drainage districts. In any case where the decree is or has been entered setting aside the establishment of a drainage district for errors in the

proceedings taken, and such decree becomes final, the board of supervisors shall recind its order establishing the drainage district, assessing benefits, and levying the tax based thereon, and shall also cancel any contract made for construction work or material, and may refund any or all assessments paid in. The board shall fix a new date for hearing, giving notice thereof by publication for two weeks and at the time so fixed, enter its order as to the establishment of the proposed district, and thereafter proceed as by law provided.

Sec. 1989-a15 *Obstructions—Nuisance—Abatement.* That the law appears in section nineteen hundred eighty-nine-a fifteen of the supplement to the code, 1907, be and the same is hereby repealed and the following enacted in lieu thereof: "Any ditch, drain or watercourse, which is now or hereafter may be constructed so as to prevent the surface and overflow water from the adjacent lands from entering the same, is hereby declared as a nuisance and may be abated as much. Any person, firm or corporation diverting, obstructing, impeding or filling up, without legal authority, any ditch, drain or watercourse, or breaking down any levee established, constructed or maintained under any provision of law, shall be deemed guilty of misdemeanor and punished accordingly."

Sec. 1989-a16. *Subsequent Proceedings—Use of Former Surveys.* In any proceedings heretofore or hereafter had for the establishment of a ditch; drain, levee or the changing of a natural watercourse, or the establishment of the levee or drainage district where an engineer has been appointed and has made a complete survey, return and plat thereof and for any reason the improvement has been abandoned and the proceedings dismissed and afterwards proceedings are instituted for the establishment of a levee or drainage district, or the changing (of) a natural watercourse, for the bene-

fit or reclamation of the same territory surveyed in said former proceedings, or part thereof, or the same with territory additional thereto, the engineer shall use the return, levels and surveys, plat and profile made in said former proceedings, or so much thereof as may be applicable and in case the cost of said returns, levels, surveys, plat and profile made in said former proceedings have been said for by the former petitioners or their bondsmen, then a reasonable amount shall be allowed said petitioners or bondsmen for the use of the same.

Sec. 1989-a21. *Control — Repairs — Cost.* Whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed as hereinbefore provided; provided, however, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act, or the negligence of his agent or employe, or if the same is filled and obstructed by

the cattle, hogs or other stock of such owner, employe or agent, then the cost thereof shall be assessed and levied against the lands of such owner alone.

Sec. 1989-a26. *Special Assessment—How Paid —Improvement Certificates—Waivers.* The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section shall within thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the other with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with in-

terest from the date of such assessment, and shall be collected at the next succeeding March semiannual payment of ordinary taxes. All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes. And the board may provide by resolution for the issuance of improvement certificates, payable to bearer or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of same and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor or assigns all right and interest in and to the tax in every such assessment or part thereof described therein, and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per centum per annum, payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of the tax so levied against his property, together with interest thereon to date of payment at any time he desires so to do, even before the maturity of any certificates issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Should the costs of such work exceed the

> amount of benefits assessed and certificates issued, a new apportionment and levy of tax may be made and other certificates issued in like manner. If the board of supervisors provides for the issuance of improvement certificates by the owners of lands, the township trustees may execute waivers, and there may be issued improvement certificates for such part of the assessment for benefits to highways as is to be paid by the township, such waivers and certificates to conform as nearly as may be to those executed upon the assessments against lands.

The action of the Board of Supervisors complained of by plaintiffs in error was had and taken under this last section of the Iowa State, to-wit, Section 1989-a-21. There is no requirement in the Iowa Statute necessitating the giving of notice of the intention or purpose of the Board of Supervisors to repair a drainage improvement, or to let a contract, or to advertise for bids for the construction of such improvement. The Supreme Court of Iowa, in discussing the absence from the statute of any such requirement said:

> "This responsibility, Section 1989-a-21 places upon the Board of Supervisors. The duty is one which is continuous, calling for supervision from day to day and month to month, or, in the language of the statute, 'at all times.' The work to be done may involve considerable expense or it may be a succession of petty repairs each of which is comparatively inexpensive. To require that in each case the Board must advertise the job and seek the lowest bidder would be to hamper and prevent its efficient action without any corresponding benefit to the public. It is not at all strange that a drainage system once completed and put to practical use should develop here and there a defect, and if such

defect can be remedied or the efficiency of the system be increased by lowering the bottom of the channel at some point or by widening the cut in another place the right of the board to which the duty of care and maintenance is committed, to do what ought to be done to that end, ought not to be unreasonably restricted.

The contract between the Board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to 'enlarge, reopen, deepen, widen and straighten' the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. *The statute imposes no duty to give notice in advance of each separate work of repair,* or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds."

In the instant case no additional right of way was taken or appropriated by the Board of Supervisors in the work of repairing, cleaning, and deepening the old drainage ditch. It is true that the contractor extended the outlet of the ditch a short distance. He neither asked nor received pay for this work of extending the outlet beyond its original end. Plaintiffs in error were not injured in any way and no assessment for such extension was levied against the lands of the plaintiffs in error. The Supreme Court of Iowa, in passing upon this point, said:

> "The charge in the plaintiff's petition and repeated in argument that the work contracted for and done included a lengthening or extension of the ditch or ditches beyond their original dimensions is not justified by the record, but as we have said it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent materially deepened."

The Supreme Court of Iowa (p. 89 R) said:

> "It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system, but for this work he testifies he neither asked nor received compensation and his statement does not appear to be disputed."

It is, therefore, obvious that the finding and determination of the Supreme Court of Iowa on this determinative fact question is against the contention of the plaintiffs in error. If we correctly understand the position of the plaintiffs in error in this court, they do not contend that if the work done by the Board of Supervisors and the contractor Hiatt was merely to repair the old improvement and assess the cost thereof against the lands of the plaintiffs in error, that no rights of the plaintiffs in error protected by the Federal Constitution were invaded or violated; but it is the contention of the plaintiffs in error, that the work performed by the Board of Supervisors and the contractor constituted, in fact, a new improvement under the guise of repair. We do not see how this claim can with any force be urged upon the consideration of this court, for the reason that the Su-

preme Court of Iowa, which hears equity cases *de novo*, specifically and definitely determined this fact question against the plaintiffs in error. This fact question, being determinative of this controversy, necessarily entitled the defendants in error to a dismissal of the writ of error and an affirmance of the judgment of the Supreme Court of Iowa.

Where a determinative non-Federal question, and also a Federal question, are involved, the decision of the State Supreme Court on the determinative non-Federal question is conclusive of the rights of the parties to this litigation, notwithstanding an adverse decision of the Supreme Court upon the Federal question raised and involved in this cause. The court has repeatedly held that even the decision by the State Court of a Federal question will not sustain the jurisdiction of the court if another question, not Federal, was also raised and decided against the plaintiffs in error, or the decision thereof be sufficient notwithstanding the Federal question, to sustain the judgment.

In *Harrison* v. *Morton* (171 U. S. 38, 18 S. C. Rep. 742) the court said, on page 745:

> "It is settled law that to give this court jurisdiction of a writ of error to a State Court, it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause and that it was actually decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without de-

ciding it (*Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet, et al.*, 138 U. S. 635, 11 S. C. Rep. 435). It is likewise settled law that where the record disclosed that *if a question has been raised and decided adversely to the party claiming the benefit of a provision of the Constitution or Laws of the United States and another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment* (*Wade* v. *Lawder*, 165 U. S. 624, 17 S. C. Rep. 425)."

Waters Pierce Oil Company v. *State of Texas*, 29 S. C. Rep. 227.

Mellon & Company v. *McCaffrey*, 239 U. S. 134, 36 S. C. Rep. 94.

We assume that it is not the province of this court to re-investigate disputed fact questions and to reverse the judgment of a Supreme Court upon a finding of fact, but that this court will accept as a verity and as a finality the finding of a State Supreme Court upon disputed facts and accept with full faith the correctness of such fact determination. Plaintiffs in error in their brief re-argue disputed fact questions, notwithstanding the judgment of the Supreme Court of Iowa determining the actual facts to be hostile to the contention of the plaintiffs in error.

The Law Question.

(b) The law question calls for a decision of this court as to whether or not certain sections of the Iowa Drainage Law violate the Constitution of the United

States, to-wit, was the property of the plaintiffs in error appropriated without due process of law?

A drainage ditch necessarily begins to deteriorate immediately following its original construction. This deterioration may be produced by an infinite number of causes—the nature of the soil, the flow of water, storms, the crumbling and falling away of the banks, are perhaps the principal factors causing such deterioration. Unless the ditch is kept in repair the entire project or reclamation of the swamp and overflowed lands becomes a nullity. In such event the burdens of special assessments imposed upon lands for the original construction of the ditch would be without corresponding benefits to the land. The Iowa Legislature foresaw, at the time of the passage of the drainage law, the necessity of keeping open, free and clean the drainage ditches of Iowa, and under Code Section 1989-a-21 above quoted, the duty is specifically placed upon the board of supervisors to at all times see to it that the ditches are kept open and in repair, and if they do not work efficiently to cause the removal of the difficulty. We urge upon the attention of the court the fact that the complaint of the plaintiffs in error is not founded upon the action of the board of supervisors of Pocahontas County in the original establishment of the ditch, or in levying the original assessment for the cost of the original construction of the ditch, but years after such ditch was constructed, and while the ditch was in an ineffective and inefficient condition, the board, following the injunction and requirements of the statute, took such action as to repair the

defects and restore the ditch to an efficient condition, and the cost of such restoration was assessed, not against the plaintiffs in error, but against the lands in the drainage district, on the basis and in the proportion as adopted when the first or original assessment was made for the original construction of the ditch. This action of the board in levying this second assessment against the lands in the drainage district for the cost of repair was taken under Section 1989-a-21 of the Statutes of Iowa, as follows:

> "The cost of such repairs or change shall be paid by the Board from the drainage fund of said levee or drainage district, *or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed.*"

Section 1989-a-12 of the drainage law, set forth in the preceding pages of this brief, provides how the original assessment shall be made, how the lands in the drainage district shall be classified. Among other provisions of this latter section is the following:

> "If the first assessment made by the Board of Supervisors for the original cost or for repairs of any improvement as provided in this Act is insufficient, the Board may make an additional assessment and levy in the same ratio as the first for either purpose."

NOTICE.

Code, Section 1989-a-3, provides for and requires the giving of notice to the landowners of the time and place of hearing that the petition for the assessment of

a drainage district will be held and passed upon by the Board of Supervisors.

Code, Section 1989-a-4, provides an opportunity for the landowners to file claim for damages.

Code, Section 1989-a-6, affords the landowners an opportunity to appeal from the finding of the Board to the District Court on the allowance of damages.

Code, Section 1989-a-12, determines the method of assessment and fixes the rule for the apportionment and ascertainment thereof.

Code, Section 1989-a-14, affords the aggrieved landowners an appeal to the District Court from the action of the Board of Supervisors on the classification of lands, apportionment of the assessment and the levying thereof.

It is, therefore, most obvious that the constitutional rights of the landowner are adequately and completely safeguarded by the foregoing provisions of the Iowa law. The landowner is entitled to notice of the time and place of hearing of every act of the Board in the establishment of the drainage improvement and in the levying of the assessment to defray the expenses and cost thereof. The landowner, therefore, has, or is entitled to, under the foregoing provisions of the law, his day in court. Due process is completely proffered to him. Surely, it cannot seriously be contended that any constitutional right is invaded or violated by the action of the Legislature of the State of Iowa in passing a law that all future assessments for repairs of a drainage ditch shall be paid by levying an assessment on the same basis

and in the same proportion that the original assessment for the original cost was levied. At the time the original assessment was levied the Iowa statutes provided for and contemplated future assessments upon the same basis as the original assessment to cover the cost of repairs of the ditch. Plaintiffs in error knew of this law, they were bound by its provisions, they had the right not only to protect themselves against an unjust or unfair original ratio of assessment, but at that time and place they were entitled to raise and have determined, by the Board of Supervisors or by the courts of the State of Iowa, the question of the justice and correctness of the original classifications of the land and the ratio of, not only the assessment levied for the original cost of the improvement, but future assessments for the repair of the ditch. It cannot be contended that the plaintiffs in error had the constitutional right to appear before the Board and object to the letting of the contract for repairs. The Iowa statute provides for no such notice; the plaintiffs in error were not entitled to such a notice or to a hearing upon that question. The plaintiffs in error cannot successfully assert the claim that they have the constitutional right to appear before the Board of Supervisors and object to the proposed action of the Board in determining the legislative question of whether or not the Board should clean out and repair the ditch. No claim is made by the plaintiffs in error that any of their real estate was appropriated or taken for public use in the cleaning or repairing of the ditch, their claim being based solely and exclusively upon the theory that their prop-

erty is being taken without due process of law for the reason that the Board has levied an assessment against their property for the cost, not of a new improvement, but rather, to repair an existing one. The plaintiffs in error claim that they were entitled to notice of the proposed action of the Board of Supervisors in levying the additional assessment to defray the cost of the repair. They claim that they had the right, afforded them by the Constitution, to appear before the Board and file objections to such proposed action. Even if they did so appear before the Board of Supervisors, the Board would be powerless, under the Iowa statute, to afford any relief to the plaintiffs in error in reference to the amount of the assessment that might be levied against any particular tract of land, or in reference to the classification into high, low, wet or swamp lands. The classification of the lands of the plaintiffs in error into the foregoing four sub-divisions, under the drainage law, was had and irrevocably fixed long prior to any action of the Board taken in reference to the repair or cleaning of the ditch. The plaintiffs had, long years before that time, due process of law and their day in court to object to such classification. Under the Iowa Drainage Law the amount and ratio of assessment for benefits is determined and fixed by the classification of the land into "high low, wet or swamp" lands. This classification once made becomes irrevocable in the absence of judicial interference, and all subsequent assessments levied for the purpose of defraying expenses to keep the drainage system efficient must, under the provisions of the Iowa

statute, be apportioned upon the basis of the original classification and original ratio of assessment. What rights, then, could the plaintiffs in error assert, if notice was given to them and they did appear before the Board of Supervisors to object to the proposed assessment to pay the costs of repairs? Such protests, such hearing, such objections would be void of results, for the reason that the Board of Supervisors, in levying such additional assessment, under the Iowa statute, have only the simple duty to perform of ascertaining the cost of the repairs and assess it against all lands in the district on the basis and in the ratio of the original assessment. It is not true, and we deny the assertion, that the landowner is entitled to notice and hearing of every proposed assessment or levying of taxes. This very question has repeatedly been before this court, and this court has announced frequently the rules which we now invoke in this cause.

We quote from the case of *Hagar* v. *Reclamation District* (111 U. S. 701; 4 S. C. Rep. p. 667). The opinion was by Mr. Justice Field:

> "The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him or without his being afforded any opportunity to be heard respecting it; the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be heard are essential to render any proceeding due process of law which may lead to the deprivation of liberty or property. * * * But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice

to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of delay upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley in his concurring opinion in *Davidson* v. *New Orleans*: 'In judging what is "due process of law" respect must be had to the cause and object to the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law."' The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. As said by this court: 'It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness: It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state, as to the mode, form and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction. (State Tax on Foreign-held Bonds, 15 Wall, 319.) Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, *no notice can be given to the tax-payer, nor would notice be of any possible advantage to him*, such as poll-taxes, license taxes

(not dependent upon the extent of his business), and, generally, specific taxes on things or persons or occupations. In such cases the Legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is therefore invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can effect the amount to be collected from him. So if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege they have only to pay the amount required. In such cases there is no necessity for notice or hearing. *The amount of the tax would not be changed by it.* But where a tax on property is levied not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them through Boards of Revision or Equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments.

> The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

Let us apply the foregoing rules to the case at bar and what is the result? In levying the lands of the plaintiffs in error to cover the cost of repairs, the Board of Supervisors was not acting in a judicial capacity. They were not ascertaining the value of plaintiffs' property. When it was determined what the cost of the repair was, it was the duty of the Board of Supervisors, under the Iowa statute, to forthwith make and levy a special assessment against all the lands in the drainage district upon the same ratio as the original assessment was made. There was no need of a hearing by the plaintiffs in error in such a case. No rights of the plaintiffs were invaded. The tax was determined and ascertained when the cost of the improvement was known and the Board of Supervisors was divested of any discretion as to the amount that should be levied against any particular tract of land in the drainage district. The Legislature of the State of Iowa has jurisdiction over the lands of the plaintiffs in error. The Legislature has the power to delegate to the Board of Supervisors the exercise of such jurisdiction. The Board of Supervisors, therefore, had the power to classify at the time of the original construction of the ditch the lands of the plaintiffs in error and to determine for all future time the basis or ratio of subsequent assessments to cover the cost of keeping

efficient the drainage system. The assessments complained of are not personal. They are against the lands within the drainage district. Let us assume that hereafter it shall become necessary for the Board of Supervisors of Pocahontas County to again claim this drainage ditch and keep it in repair, incurring expenses thereby, could it be successfully maintained that the future grantees of the present plaintiffs in error would be entitled to a new hearing and a reopening of the question of the original classification of the lands within the drainage district because they had no notice or knowledge of the action of the Board in cleaning and repairing the ditch and levying the special assessment against the lands in the district, to defray the cost of such repair and cleaning? Surely, such a contention could not seriously or effectively be asserted or maintained. The Legislature has taken away from, or rather, never delegated to the Board of Supervisors any discretion in levying any future assessments after the original assessment. The plaintiffs in error claim that they are entitled to a hearing on the question whether the benefits to their different tracts of land would be in accord with the original classification. Surely this cannot be seriously presented to the consideration of this court. If it is, then we suggest that the question is foreclosed against the plaintiffs in error by the decisions of Your Honors.

This court, speaking through Mr. Justice Van Devanter, in *Embree* v. *Kansas City et al.* (240 U. S. 242; 30 L. Ed. 629; 36 S. C. Rep. 317), said:

"The claim that the landowners are entitled to a hearing on the question whether the benefits in the different zones will be in accord with the graduated ratings of their lands is not seriously pressed upon our attention and requires but brief notice. *The ratings are not fixed in the exercise of delegated authority, but by the statute itself,* which must be taken as a legislative decision that in a district lawfully constituted in the manner before indicated, the benefits to the lands in the different zones will be in approximate accord with the ratings named. This being so, no hearing is essential to give effect to this feature of the apportionment. A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power. (Citing many cases.) * * * The claim that the landowners are not afforded an opportunity to be heard in respect of the value of their lands is also untenable. While no hearing is given when the lands are appraised, one is accorded when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice, when, as the Supreme Court of the State holds, owners aggrieved by the valuation may have a full hearing upon that question." (*Davidson* v. *New Orleans, supra.*)

In the cases at bar the plaintiffs in error had their day in court, their notice, their opportunity to be heard, when their lands were originally classified, when the original assessment was made, and it is the specific direction of the statute that all subsequent assessments for the cost of repairs shall be levied upon the basis of the original assessment. Surely, this is due process of law.

"The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do

so, and may settle both questions for itself and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the Legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In doing so, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement; and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakably unjust, is not open to our review. The question of special benefit, and the property to which it extends, is of necessity a question of fact; and when the Legislature determines it in a case within its general power, its decision must, of course, be final. * * * The precise wrong of which complaint is made appears to be that the landowners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the Legislature, and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is, a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence, propriety and justice, being confided to its jurisdiction. It may err, but the courts cannot review its discretion." *Spencer* v. *Merchant*, 125 U. S. 345; 8 S. C. Rep. 921.

This court announced the foregoing rule in a case where after an assessment for improving a street was partly paid it was declared void for want of any hearing or notice and the unpaid portion was cancelled. Subsequently the legislature directed an assessment of the amount so cancelled, with interest, upon the lands upon which the former assessment was not paid, and provided for an apportionment with notice thereof. In this case Your Honors held that it was not an attempt to deprive any person of property without due process of law, it being within the power of the legislature to determine not only the amount of the tax to be levied for public improvements, but also the class of lands which shall bear the burden. Tax statutes should be liberally construed and tax proceedings will not be declared lacking in due process of law by enforced collection of taxes merely because it may in individual cases work hardships and unequal burdens.

King v. *Mullins, et al*, 171 U. S. 404; 18 S. C. Rep. 925; 43 L. Ed. 214.

Kelly v. *Pittsburg*, 104 U. S. 78, 26 L. Ed. 659.

Hodge v. *Muscatine Company*, 176 U. S. 276, 25 S. C. Rep. 231, 39 L. Ed. 477.

The power to tax is a legislative power and may not be delegated for municipal purposes to a body of persons not elected by and immediately responsible to the people.

State v. *Mayor et al.*, 103 Iowa, 76.

Nothing is to be found in the Constitution of the State of Iowa limiting the power of the legislature to

delegate authority to levy special assessments save as it denies the right to take property without due process of law. The Iowa Drainage Law is not inimical to this.

Yeomans v. *Riddle*, 84 Iowa, 147.

There is no constitutional requirement or principle of law exacting that the officers who apportion the cost and levy the assessment to pay the same against the lands benefited by the improvement shall be chosen by the electors of the district.

Munn v. *Board of Supervisors*, 161 Iowa 26-36.

This court in *Wurtz* v. *Hoagland* (114 U. S. 615, 29 L. Ed. 232, 5 S. C. Rep. 1091), in construing the drainage statute of the state of New Jersey, said:

> "The statute of 1871 is applicable to any tract of land within the state which is subject to overflow from freshets, or which is usually in low, marshy, boggy, or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioner can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioner's report of the expense of the work, and of the lands which, in their judgment, ought to contribute, as well as before the commissioners; and on any error in law or in the principles assessment, before the court, upon the amount of the assessment. As the statute is applicable to all

lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States."

Almost the identical question that arose in the case at bar was presented to the consideration of the Supreme Court of Delaware in *English* v. *Mayor of the City of Wilmington, et al.*, (2 Md. 91, 37 Atl. Rep. 163). An Act of the Legislature of Maryland passed April 29, 1891, provided that the cost of constructing a complete sewer system for a city shall be assessed on all property adjoining a sewer or with access thereto, at a fixed and uniform rate per foot of frontage, and per square foot of area to a certain depth. It was held that it was a valid exercise of legislative discretion in assessing benefits, and it was no objection to the constitutionality of said statute that the amount of the assessment was based upon an estimate of the cost of the sewer system, and the statute did not deprive the assessed abutters of their property without due process of law because it did not provide for notice and hearing before the assessment was levied, and that the Legislature of Maryland might, without notice to property owners to be assessed, fix the amount per foot of frontage and square foot of area which property adjoining a sewer shall be assessed. On page 161 of the Atlantic Reporter, *supra*, the Supreme Court of Maryland said:

"Judge Cooley sums up so admirably the grounds upon which the courts would undertake to decide that the Legislature had exceeded its authority in such exercise of the taxing power that I will quote and adopt his language, as follows: 'It is conceded that the legislative judgment that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusion is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation. This is confessedly inadmissible, in any case where the legislative power has not been exceeded by an apportionment merely colorable. * * * In the act under consideration it is clearly the opinion of the court that the legislature had acted within their legitimate sphere, so far as the objections hitherto considered are concerned, which cannot be sustained either on principle or authority. The following are some of the cases in which the courts in other states have sustained similar statutes, for the method of apportionment adopted by the legislature in this case seems to have become increasingly popular of late years throughout the Union: *Cleveland* v. *Tripp*, 13 R. I. 60; *McGee* v. *Com.*, 46 Pa. St. 358; *Palmer* v. *Stumph*, 29 Ind. 329; *Allen* v. *Drew*, 44 Vt. 174; *Ernst* v. *Kunkle*, 5 Ohio St. 520; *Parker* v. *Challiss*, 9 Kan. 155; *Motz* v. *City of Detroit*, 18 Mich. 495; *State* v. *Fuller*, 34 N. J. Law. 227; *City of St. Louis* v. *Clemens*, 49 Mo. 552; *Emery* v. *Gas Co.*, 28 Cal. 345. * * *

The ground is now clear for the remaining and more important objection to the constitutionality

of the act, viz. the want of notice; it being strongly urged and ably argued by counsel that the want of notice is fatal to the validity of the assessment on the fundamental principles of civil liberty, and more especially because of the due process of law clause in the Fourteenth Amendment to the Constitution of the United States. Whenever the first method of assessment above referred to is adopted by the legislature, viz. an assessment made by assessors or commissioners, appointed for the purpose under legislative authority, and who are to view the estates and levy the expense in proportion to the benefits which, in their opinion, the estates, respectively, will receive from the work proposed, it is now unquestioned and unquestionable that an opportunity for a hearing is absolutely necessary to the validity of the assessment. That is so clear that it is remarkable that it should have been litigated at so late a date as the well known New York case of *Stuart* v. *Palmer*, 74 New York 183. The question has been repeatedly discussed, however, when the second method has been adopted; that is, when the Legislature, as in this case, itself fixed upon some definite standard, which is applied to estates by a measurement of length of quantity or by a value independently fixed. In such cases it is argued that nothing remains to be done to fix upon each individual the amount of his assessment except to make a mathematical calculation, and as a hearing or an opportunity for a hearing would therefore be useless and futile, the maxim, '*Cessante ratione, cessat et ipsa lex*,' would apply. It seems impossible to find any valid distinction between the unquestioned power of the Legislature to impose, without notice, or opportunity for a hearing such taxes as poll taxes, license taxes (not dependent upon the extent of the individual's business), and generally, specific taxes on things or persons or occupations, and their power to impose, in the same manner,

that kind of tax called 'special assessment for local improvement,' subject, of course, to the limitations already set forth, which are inherent in the nature of the taxing power, and have been already dwelt upon at great length. In the case of the taxes first above enumerated the legislature, in authorizing the tax, fixes its amount and that is the end of the matter. But the Supreme Court of the United States is the tribunal to which we must look for the authoritative construction of the Fourteenth Amendment to the United States Constitution and its application to this question of notice. There is a series of decisions of that court, bearing more or less directly upon this question, which are referred to and reviewed in every well-considered case upon the subject. It will not be necessary, however, to cite or review them all, for they are all reviewed fully in the two cases from which I shall quote at length, *Hagar* v. *Reclamation District*, 111 U. S. 701. * * * But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. But this statute, the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute and that was all the notice and hearing to which they were entitled. In

this holding that the legislature, without notice, could conclusively settle that the lots upon which no part of the void assessment had been paid, and which, as we have seen, were isolated parcels not contiguous, and many of them not fronting on the avenue, should be assessed a certain portion of a certain sum imposed upon all the lots within the district created by the act under which the void assessment was made, it would seem that the Supreme Court necessarily implied that the Legislature could also have conclusively settled, if it had seen fit so to do, the portion of that portion which each one of the selected lots should be assessed; provided that, under the general laws of New York, it would have been possible for the lot owners to contest the constitutionality of the act. It is impossible to conceive of any objection to the power of the Legislature to fix without notice the amount of the assessment upon the individual lots of such a selected group of lots which would not apply with equal force to fixing it upon such a group. If it could distribute the amount between different groups of lots, why could it not distribute the amount apportioned to a group, between the individuals of a group? It is true that in the concluding paragraph of the clause above cited Justice Gray refers to the notice and hearing granted to the individual lot owners, but it is to be remembered that the mode of apportionment between them was according to the judgment of commissioners as to the amount of benefit, which necessarily depended upon and required a hearing, and the hearing of such a hearing upon the point decided by the court would seem to be indicated by the concluding sentence of the above quoted clause, in which Justice Gray says: 'It thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled.' But under

> the laws of this state any property owner whose rights were affected by the statute now under consideration could at the proper time test the constitutionality of the act, and, further, could institute proceedings for the correction of injustice, fraud, or error in making the mathematical calculations. Thus are also met the requirements laid down by the Supreme Court in the case we have already cited of *Davidson* v. *City of New Orleans*, 96 U. S. 97. The Rhode Island Courts have sustained statutes almost identical with this one."

We quote from Mr. Justice Brewer, in *Gillette* v. *City of Denver* (2 Fed. Rep. 823). This is a sewer assessment case where the assessment was imposed upon the property within the district according to the area, and the objection was raised that no notice was provided, and there was therefore no due process of law:

> "Now, in this case, the tax is laid by the area; no question of value, no matter of judgment—a mere mathematical calculation; and of what earthly profit could it be to a taxpayer to have notice of that calculation? He can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be."

Apply the foregoing rules to the case at bar, and we have this result: the ratio of assessment complained of in the case at bar was definitely and specifically settled by the Act of the Legislature of the State of Iowa. The drainage law instructs and requires the Board of Supervisors, after it ascertains the amount of the cost of repairing the ditch, to assess this entire cost upon all the lands within the district upon the same basis and the same ratio as the original assessment was made. The Legis-

lature in determining how this assessment for repairs should be made, did not vest in any tribunal the right to determine the valuation of the lands or to exercise any judgment thereon. It merely clothed the Board of Supervisors with the power to execute a mathematical calculation; and of what earthly profit could it have been to plaintiffs in error to have notice of that calculation?

Practically the same question involved in this case came before the Supreme Court of Missouri (115 S. W. p. 549), in the case of *State, et rel. Brown* v. *Wilson.* This case involved the construction of a drainage statute, and the levying of a second assessment to cover the cost of the ditch. The Supreme Court of Missouri said:

> "The validity of that judgment is assailed by counsel for the defendant for the reason assigned, that it was rendered without notice to their client. It is conceded by counsel for plaintiff that defendant was not notified of the fact that the petition asking for the second assessment had been filed in the county court, or that a trial would be had thereon, without it can be successfully maintained that when he entered his appearance in court, by petitioning the court in the first instance to incorporate the district and order the improvements made, he was in court at all times for all purposes until the case was fully and finally disposed of. To be a little more specific as to the position and contentions of opposing counsel: Counsel for defendant contends that the second assessment is invalid, null, and void, for the reason that he was not notified of the proceedings which resulted in making the assessment, and that the judgment of the county court making the same, and the judgment of the Circuit Court confirming that of

the county court are also null and void, notwithstanding the fact that Section 8337 authorized the county court to make assessment 'without notice' to the landowners. That section of the statute is assailed as being unconstitutional because it authorizes the taking of property without due process of law. While, upon the other hand, counsel for plaintiff insist that when defendant entered his appearance by siging the petition asking the county court to have the improvemets made, he was in court for all purposes, and remained there as long as the court had any duties to perform in the case, and until it was finally disposed of; that, being in court, the law required him to take notice of every step taken, order made, and judgment entered by the court, just as one is required to do in any ordinary case pending in the county or circuit court. They also insist that the real and only true assessment of benefits recommended by the commissioners and made by the court is the one stating that the land would be benefited from $25 to $30 per acre by the proposed improvements, and that the so-called first and second assessments are but the orders of the court, ordering the landowners to pay over to the commissioners a first or second estimate or installment of the benefits previously assessed. In our judgment counsel for plaintiff have correctly construed said Article 5. It requires a petition to be filed with the county court, signed by the landowners, praying for a judgment incorporation of the drainage company, and requiring certain things to be stated therein; among others, that notice shall be given to all owners of lands affected that commissioners should be appointed to view the premises and report to the court certain things, among others, the amount of the benefits the lands would receive and the amount of damages, if any, they would sustain in consequence of the proposed improvements, and the probable cost of

the improvements. That in pursuance thereof commissioners were appointed; that they viewed the premises and found and reported that there were 3,500 acres of land which could be reclaimed * * * Under this view of Article 5, not only was defendant in court all the time the proceedings were pending, but it is also true that all the benefits were assessed in the first instance, which was $25 to $30 upon each and every tract of land embraced within the district; and Section 8337 authorized the court upon the filing of the second report by the commissioners, that if the first installment of the assessment was not sufficient to complete the work, then to order a supplemental installment to be paid out of the benefits previously assessed against the property. In this manner, installment after installment might be ordered paid until all of the benefits assessed against the lands would be exhausted and paid by the landowners. The very object and purpose of the Legislature in having the maximum amount of benefits assessed in the first instance, and then providing that they should be paid on estimates or in installments, was for the benefit and protection of the landowner. In that manner no more tax would be collected than would be necessary to complete the work, while if the landowners had been required to pay all the benefits assessed in the first instance, then a sum of money far in excess of the requirements of the improvement would be paid over and collected by them. * * * We must therefore hold that defendant had his day in court, and having availed himself of the hearing there accorded him, he will not now be heard to say either in law or fact that the assessment complained of was invalid or deprived him of his property without due process of law, nor that his property was taken for public use without just compensation, for the record discloses that the benefits received by him by way of improvements are far in excess of the cost of the improvements."

The same question involved in this case came before the Supreme Court of Wisconsin in *Stone* v. *Little Yellow Drainage District* (95 N. W. 405). That court said:

> "The additional assessment of approximately $40,000 * * * is assailed on the further ground that the procedure taken, which is in accord with the statute, fails to constitute due process of law, in that no notice whatever is required by the statute, or was in fact given, of the application of the commissioners to make such assessment; resulting, as appellant claims, in the taking from him of his property by the collection of assessments, and, in advance thereof, by the imposition of a lien upon his land. The statutory provision is Section 1379-24, Rev. St. 1898, as amended by section 6, c. 43, p. 51, Laws of 1901, and is: 'If in the first assessment the commissioners shall have reported to the court a smaller sum than is needed to complete the work of construction or repair * * * a further assessment on the lands benefited, proportioned on the first, shall be made under the order of the court or the presiding judge thereof *without notice*.' We should have little doubt of the cogency of such an objection to a statute which originally authorized an imposition or assessment upon private property without any notice to him whatever, whether the result were to be accomplished by the judgment of a court, or by the decision of some legislative or executive tribunal. This second order, however, and the law authorizing it are not such. It is at most but one step in a general scheme of procedure, and must be considered in connection with the other parts. It has frequently been held that, even in tax proceedings out of court, notice of each step is by no means essential to due process of law, but that notice at any stage of the proceedings whereby the property owner has opportunity to be heard as to the apportion-

ment of a share of the burden to him is sufficient. *State* v. *Whittlesey*, 17 Wash. 447; 50 Pac. 119. * * * Even more obviously is it competent for the Legislature to dispense with notice of the various steps in a judicial proceeding after jurisdiction over a party has been acquired by due notice of its commencement. He may then be required to keep himself informed of all further steps or action within the limits of the jurisdiction so obtained. A still further and perhaps stronger reason controls the objection now made namely, that notice of this additional assessment could have availed plaintiff nothing. Every question upon which he had any right to be heard had already been concluded. The court, by its former order, had established the public purpose, the benefit to plaintiff's land, and the proportion. All that could be done by the commissioners or by the court in making this second assessment was mere arithmetical computation, for which the presence of a property owner was neither necessary nor useful. No error therein could prejudice him. *People* v. *Chapman*, 127 Ill. 387, 19 N. E. 872. For these reasons we conclude that it was competent for the Legislature to authorize this step without further notice and that the order of July 18, 1901, was also within the jurisdiction of the court, and, like its former orders, impregnable to collateral assault."

The legislature of the State of Iowa has determined the classification of all lands in the drainage district for the purpose of forming a basis of assessments levied to defray the cost of repairs in keeping the drainage improvement efficient. By the same section of the statute it has determined the ratio of assessment. This identical question has very frequently come before this court. In 1915, in *Wagner* v. *Leser* (239 U. S. 207, 36 S. C. Rep. 66), this court said:

"It is further urged, and much stress seems to be laid upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this court. *This assessment, and the classification of the property to be improved, were fixed and designated by legislative act.* It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front. We think such a tax, when levied by the Legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution."

In *Spencer* v. *Merchant* (125 U. S. 345, 8 S. C. Rep. 921), this court, speaking through Mr. Justice Gray, said:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

We urge upon the consideration of the court our contention that the question raised by the plaintiffs in error in this cause that they were entitled to a notice and hearing before the Board of Supervisors of Pocahontas County to levy the additional assessment, is foreclosed by the decisions of this court. By an act of the Legislature the Board of Supervisors received the delegated power merely to perform mathematical calculations, ascertain the cost of the repair and the improvement of the drainage system. With this amount ascertained, the Board was vested merely with clerical power to compute the amount of the tax upon each forty-acre tract of land in the drainage district upon the basis of ratio fixed by the original classification and assessment. No relief could be granted to the plaintiffs in error by the Board of Supervisors if the plaintiffs in error did appear before the Board at the time of the last assessment and object thereto, because they were foreclosed by an act of the Legislature from taking or seeking any step to decrease their assessments.

We quote further from the case of *Wagner* v. *Leser*, *supra*:

> "This case has been followed and approved in subsequent decisions in this court. *Parsons* v. *District of Columbia*, 170 U. S. 45, 50, 56, 52 L. Ed. 943, 945, 947, 18 S. C. Rep. 521; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 343, 45 L. Ed. 879, 889, 21 S. C. Rep. 625. In the latter case, the former cases in this court were reviewed at length, and *Spencer* v. *Merchant*, quoted with approval; *Norwood* v. *Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 S. C. Rep. k87, was commented upon and dis-

tinguished. *French* v. *Barber Asphalt Paving Co., supra,* was followed and approved in a series of cases in the same volume; *Wight* v. *Davidson,* 181 U. S. 371, 45 L. Ed. 900, 21 S. C. Rep. 616; *Tonawanda* v. *Lyon,* 181 U. S. 389, 45 L. Ed. 908, 21 S. C. Rep. 609; *Webster* v. *Fargo,* 181 U. S. 394, 45 L. Ed. 912, 21 S. C. Rep. 623; *Cass Farm Co.* v. *Detroit,* 181 U. S. 396, 45 L. Ed. 914, 21 S. C. Rep. 644; *Detroit* v. *Parker,* 181 U. S. 399, 45 L. Ed. 917, 21 S. C. Rep. 624; *Wormley* v. *District of Columbia,* 181 U. S. 402, 45 L. Ed. 921, 21 S. C. Rep. 609; *Shumate* v. *Heman,* 181 U. S. 402, 45 L. Ed. 922, 21 S. C. Rep. 645; *Farrell* v. *West Chicago Park,* 181 U. S. 404, 45 L. Ed. 924, 21 S. C. Rep. 609; *French* v. *Barber Asphalt Paving Co., supra,* was referred to with approval in *Hibben* v. *Smith,* 191 U. S. 310, 326, 48 L. Ed. 195, 201, 24 S. C. Rep. 88. See also *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.,* 197 U. S. 430, 49 L. Ed. 819, 25 S. C. Rep. 466; *Martin* v. *District of Columbia,* 205 U. S. 135, 51 L. Ed. 743, 27 S. C. Rep. 440.

Norwood v. *Baker, supra,* is much relied upon by the plaintiff in error, and while this court has shown no disposition to overrule that case when limited to the decision actually made by the court, much that is said in it must be read in connection with the subsequent cases in this court already referred to. In *Norwood* v. *Baker,* a portion of a person's property, located in a village of Ohio, was condemned for street purposes, and the entire cost of opening the street, including the amount paid for the strip condemned, with the costs and expenses of condemnation, was assessed upon the abutting property owner whose land was condemned. This, it was said in *French* v. *Barber Asphalt Paving Co., supra,* was an abuse of the law and an act of confiscation, and not a valid exercise of the taxing power. Taking the decisions in this

court together, we think that it results that the legislature of a state may determine the amount to be assessed for a given improvement, and designate the lands and property benefited thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

We do not understand this to mean that there may not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise. But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject. There can be no question that paving with brick in front of the property of the complainant conferred a substantial benefit, and gave authority for the subsequent legislation which, because of that benefit, original and continuing, warranted an assessment upon the property owner for a confessedly public purpose—the improvement of the streets of the city.

We are unable to find that the act of the legislature in question, or the manner of its present enforcement, operates to deprive the complainant and others similarly situated of any rights secured to them by the Federal Constitution. The judgment of the Court of Appeals of Maryland is affirmed."

We quote from *French* v. *Barber Asphalt Paving Company* (181 U. S. 324, 21 S. C. Rep. 631), as follows:

> "Assuming for the purpose of this objection, that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of benefits, we are of the opinion that the decisions of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for the hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision."

The Iowa drainage law provides for hearing for the Plaintiffs in Error before their lands were finally classified and before their lands were included in the drainage district, and before the original assessment was levied upon these lands for the cost of the original improvement.

Second Dillon, Municipal Corporations, section 752, fourth edition, is as follows:

> "The Courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. Whether the expense of making such improvement shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the

latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

Re-Assessment.

A re-assessment of property for the benefit of a public improvement may be made where the original assessment has been insufficient, or illegal, or where property subject to the assessment has been omitted. Furthermore, re-assessments may be made without violation of the guarantee of due process for the maintenance and repair of public improvements. If the owner has, by reason of notice or otherwise, been properly made a party to the proceeding, no additional notice of the re-assessment need be given him, and where the provision for notice is that there shall be three successive publications in the official newspaper of the city and objections may be filed within ten days after the last publication the time is not so short as to amount to a denial of due process of law. The validity of a re-assessment is governed by the law in force at the time it is made and it may therefore be valid, although it is not made in the manner prescribed by law at the time of the original assessment, although the property on which it is made was exempt from further assessment under the law in force when the original assessment was levied.

Corpus Juris Sestion 1067 p. 1265.

Under the Minnesota drainage statute the Legislature delegated the authority to levy additional assessments for the cost of maintaining the ditch in good condition and to defray the expense of repairs thereon. The statute did not provide for any notice of such assessments. Passing upon the constitutionality of this statute the Supreme Court of Minnesota, In re McRae, et al. (100 N. W. 384) said:

> "The constitutionality of said act is challenged * * * in this: that after providing for an assessment against all property benefited to the full extent of benefits received from the construction of such ditch, the Legislature, by section 25 of said chapter, attempted to place a further burden thereon by authorizing an additional assessment from time to time to cover the expense of maintaining and keeping such ditch in repair. We are of the opinion this additional burden may be deemed a necessary incident to the construction of the ditch. The power to specially assess is coextensive with the benefits received. It is a continuing one and may be exercised to cover the expense of maintaining such an improvement. All owners having been given an opportunity to question both the validity and amount of such assessment, not only before the board of county commissioners, but also in the court below upon appeal, or personal appearance, the authority to make an equitable assessment on the basis specifically provided by said act in our opinion does not authorize the taking of property without the due process of law, and is not in violation of the provisions of the state or Federal Constitution. (Citing authorities) We adhere to the proposition that the Legislature intended to provide exclusively for the public welfare, and that the act is valid, and does not authorize the taking of private property for

other than a public purpose, or the prosecution of any proceeding in such a manner as to deprive a person of his property except by due process of law."

The exact and specific question presented to this court by the Plaintiffs in Error was also presented to this court in *Carson* v. *Sewer Commissioners of Brockton* (182 U. S. 398, 21 S. C. Rep. 860, 45 L. Ed. 1151). The opinion is by Mr. Justice Brown. In this last cited case an ordinance provided for additional assessments for the maintenance of a sewer system. The ordinance did not require notice and none was given of the additional assessment. Your Honors said:

> "The validity of the legislative act is assailed upon the ground that no notice was required to be given to the property owner nor provision made for a hearing, and that the authority given to the city council of Brockton to change the rate of sewerage charges and assessments from time to time manifested an intention on the part of the Legislature to assess such property without regard to benefits. There is no doubt that, when land is proposed to be taken and devoted to the public service, or any serious burden is laid upon it, the owner of the land must be given an opportunity to be heard with respect to the necessity of the taking and the compensation to be paid by the city. * * * The stress of petitioner's argument appears to be laid upon the proposition that his property having been once assessed for the construction of the common sewer, he has a right to the free use of such sewer forever afterwards, and that the expense of its maintenance must be raised by general taxation, and not by special assessment. This, however, is a question of state policy. It was for the Legislature to say whether the con-

struction of the sewer entitled the adjoining property owners to the free use of it, or only to the right to a free entrance to it of their particular sewers. As held by the Supreme Judicial Court, there can be no doubt that the adjoining property owners did receive special benefit in being permitted to discharge their private sewers into it. The amount of such benefit was, under the statutes of the commonwealth, determinable by the city council, which fixed upon a certain rate for unmetered service and a certain other rate per one thousand gallons of sewage discharged for metered service. We have held in the recent case of *Parsons* .v. *District of Columbia.* * * * that it was competent for the legislative power to assess the amount of benefit specially received by abutting property, and so long as such amount is not grossly excessive, or out of all proportion to the benefit received, there is no reason to complain, particularly if, as held by the Supreme Judicial Court in this case, the question of connecting with the public sewer be left optional with the property owner. * * * No one denies that it was a special benefit to the petitioner to have a sewer built in front of his land. That benefit was the probability that the sewer would be available for use in the future. But the city, by building it and receiving a part of the cost from the petitioner, did not impliedly bind itself or the general taxes that the sewer should be maintained forever, and that the petitioner should be at liberty to use it free of further expense. If building the sewer was a special benefit, keeping the sewer in condition for use by such further expenditure as was necessary was a further special benefit to such as used it."

Conclusion.

We submit that the fact question is controlling in this case, and that the constitutional question is not in-

volved other than as a moot issue; and we further submit that the findings of the Supreme Court of Iowa are correct and should be affirmed on the fact question, which disposes of this appeal; and we further submit that the dictum as contained in the opinion handed down by the Supreme Court of Iowa in relation to the constitutional question, which, although not involved in this appeal, was referred to in the opinion handed down by the Supreme Court of Iowa as a moot question, was legally correct, and, that, as a matter of law, even though the fact question were not controlling in this appeal, the Iowa statute in relation to the assessment for repairs is constitutional and not in violation of the due process of law clause, and that it is merely a legislative issue, in that no notice of a tax of this nature is a constitutional requisite.

We respectfully ask that this appeal be dismissed and the findings of the Supreme Court of Iowa be affirmed.

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